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ATTORNEY GENERAL OPINION NO. 80- 256

The Honorable Ben Foster
State Representative, 82nd District
920 O. W. Garvey Building
Wichita, Kansas 67202

Re: Religious, Charitable and Other Organizations--
Solicitation and Collection of Funds--Professional
Fund Raisers

Synopsis: The Kansas Elks Training Center for the Handicapped (KETCH) is a charitable organization subject to the Kansas Charitable Solicitation Act, K.S.A. 17-1739, et seq. Under the facts presented, the telephone solicitation company generating revenue for KETCH is a professional fund raiser and its activities constitute the solicitation of contributions. The attorney general may proceed against the charitable organization, the professional fund raiser, or both, if less than 75% of the gross receipts from the telephone solicitation are used for charitable purposes. Cited herein: K.S.A. 17-1739, 17-1740, 17-1744 and 17-1747.

* * *

Dear Representative Foster:

You inquire of this office as to the applicability of the Kansas Charitable Solicitation Act, K.S.A. 17-1739 et seq. (Act) to a situation involving the Kansas Elks Training Center for the Handicapped, Inc. (KETCH).

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It is our understanding that KETCH, a public charity, has been offered an opportunity by a telephone solicitation company to receive 10% of the proceeds of that company's Kansas magazine sales. The solicitation firm presently sells magazines by telephone to individuals in the State of Kansas. The firm has proposed to use the name of KETCH in future phone solicitations.

The future solicitations would specifically mention that 10% of the proceeds from each purchase would go to KETCH and would thereby help the handicapped in this area. Confirmation materials and billing statements sent to purchasers would contain reference to KETCH and the specific percentage of the amount which would go to KETCH. The company is not to increase its offered price to subscribers due to the amount being given to KETCH. KETCH would incur no costs for the solicitation, but would receive 10% of the proceeds actually collected by the solicitation company from such solicitations. The solicitation company, after payment of the magazine publishers, will have amounts available for direct costs and profits, in excess of the 10% paid to KETCH.

The specific questions raised are:

- 1) Is this a charitable solicitation which would require KETCH to amend its registration statement describing the methods by which solicitations will be made (K.S.A. 17-1740)?
- 2) Would the telephone solicitation company become a professional fund raiser for KETCH subject to K.S.A. 17-1744 and other provisions of the Act?
- 3) Does the restriction contained in K.S.A. 17-1747(c) that 75% of the gross receipts be used for charitable purposes by the charitable organization provide grounds for an action by the Attorney General against any party for conducting or participating in the proposed telephone solicitation whereby only 10% of the proceeds will go to KETCH?

The Kansas Charitable Solicitation Act by requiring registration disclosure and imposing substantive regulation of conduct, regulates the solicitation and collection of funds from the public for charitable purposes. It is applicable if any organization falls within the definition of a charitable organization and there is a

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solicitation of a contribution by any means whatsoever. The definitions applicable to the Act are contained in K.S.A. 17-1739, which provides in pertinent part:

"(a) 'Charitable organization' or organization means any person who solicits and collects funds for charitable purposes or purposes alleged to be charitable

. . . .

"(f) 'Charitable purpose' means any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose"

By applying the foregoing definitions to the facts you have presented, there appears to be no question that KETCH is a charitable organization.

The first inquiry, then, becomes whether the activity of the telephone solicitation company described above is a solicitation of contributions. Since "solicit" is not defined in K.S.A. 17-1739, we turn to Black's Law Dictionary (5th Ed. 1979) wherein the following meanings are found:

"To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication."

In the described situation it is apparent that the telephone solicitation company is making requests or appeals for the purchase of magazines. Such activity is solicitation within the contemplation of the statute.

Further the prices paid by the subscribers are contributions. K.S.A. 17-1739(b) defines a contribution to mean

"the promise or grant of any money or property of value of any kind, including the promise to pay, except money or property received from a governmental authority. Reference to the dollar amount of 'contributions' in this act means in the case of promises to pay, or payments for merchandise or

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rights of any other description, the value of the total amount promised to be paid or paid for such merchandise or rights and not merely that portion of the purchase price to be applied to a charitable purpose." (Emphasis added.)

The emphasized portion quoted above indicates that payments for which the contributor receives merchandise are included. Even though the payments are made for magazines and part of that is designated for the magazine publisher, with only 10% being submitted to KETCH, the entire amount paid for the magazine is a contribution. We note that this definition of contribution is applicable to the Act only and is not related to the value of the contribution for federal income tax purposes. See, generally, I.R.C. §170.

K.S.A. 17-1740 provides in pertinent part:

"(a) Every charitable organization, except as otherwise provided in section 3 (17-1741) of this act, which solicits or intends to solicit contributions from persons in this state by any means whatsoever shall be a corporation organized under the laws of this state, and prior to any solicitation shall file with the secretary of state of the State of Kansas . . . a registration statement.

. . . .

"(d) Every registered organization shall notify the secretary of state within ten (10) days of any change in the information required to be furnished by such organization." (Emphasis added.)

K.S.A. 17-1740(d) requires the charitable organization to supplement its registration statement filed with the Secretary of State in order that information contained therein be current at all times. It is our opinion that KETCH, a charitable organization, would be soliciting contributions through its relationship with the telephone solicitation company and, therefore, must amend its registration statement.

You also question whether the telephone solicitation company would become a professional fund raiser acting for KETCH and be subject to the Act, specifically K.S.A. 17-1744. Subsection (a) of that statute provides in pertinent part:

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"No person shall act as a professional fund raiser for a charitable organization required to register pursuant to section 2 (17-1740) of this act, . . . before he has registered with the secretary of state or after the expiration or cancellation of such registration or any renewal thereof"

K.S.A. 17-1739(d) defines a professional fund raiser to mean

"any person who for compensation or other consideration plans, conducts, manages, or carries on any drive or campaign in this state for the purpose of soliciting contributions for or on behalf of any charitable organization or any other person, or who engages in the business of, or holds himself out to persons in this state as independently engaged in the business of soliciting contributions for such purposes."

It is our opinion that, under the plan described, the telephone solicitation company would become a professional fund raiser. The company will plan, conduct, manage and carry on a telephone campaign in which the caller will represent that a charitable organization will receive a benefit, namely 10% of the price of the subscription. The company is soliciting funds, contributions, something of value, and again, because of our statutory definition of contribution the fact that only 10% of the amount raised in Kansas from magazine sales is payable to the charitable organization does not defeat the application of the statute. The solicitor represents that the funds are for a charitable purpose and collected on behalf of a charitable organization. Hence, in our opinion, the company is required to fully comply with the Act.

Your final question involves a restriction contained in K.S.A. 17-1747 and possible legal action which might ensue if there is a violation of the Act. K.S.A. 17-1747(c) provides in pertinent part:

"Whenever the attorney general shall have reason to believe that any charitable organization, professional fund raiser, or professional solicitor is operating in violation of the provisions of this act, . . . or where less than seventy-five percent (75%) of the gross

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receipts, excluding any bequests or gifts by will or other testamentary device, of such charitable organizations as defined by section 1 (17-1739) are used for charitable purposes, the attorney general may bring in the district court an action in the name, and on behalf of the people of the state of Kansas against such charitable organization and any other person who has participated or is about to participate in such solicitation or collection by employing such device, scheme, artifice, false representation or promise, to enjoin such charitable organization or other person from continuing such solicitation or collection or engaging therein or doing any acts in furtherance thereof As used in this section, 'gross receipts' shall mean receipts after the legitimate and reasonable cost of any merchandise or services required with the fund raising event are deducted, but in no case shall the salary or any payment to professional fund raisers or solicitors or their respective agents be deducted."

The legislature in enacting the Act intended to protect the public from abuses in the area of charitable solicitations. K.S.A. 17-1747(c) quoted above provides a statutory formula devised to secure protection for donations given charities by the public. The formula is that at least 75% of a charitable organization's "gross receipts" from contributions must be used for charitable purposes. The term "gross receipts" is defined in such a manner as to allow deduction of the "legitimate and reasonable" cost of any merchandise or service; however, any payment to a professional fund raiser or solicitor cannot be deducted.

The Kansas Act is substantially similar to the Illinois Solicitation Act, Ill. Rev. Stat., Ch. 23, §§5101-5114. Although the Kansas courts have not interpreted the Act, the Illinois State Appellate Court has ruled upon section 5109(c), which is almost identical to K.S.A. 17-1747(c), in People, ex rel. Scott v. Police Hall of Fame, Inc., 60 Ill. App. 3d 331, 376 N.E.2d 665 (Ill. 1978). The court found that the words "legitimate and reasonable" are words which can be understood by persons of common intelligence. The terms clarify the meaning of gross receipts and afford sufficient notice to those covered by the statute that the only fund raising expenses which may be deducted from total contributions, when tabulating gross receipts, are those which are shown to have been justly incurred and related to furthering the solicitation efforts of the charitable

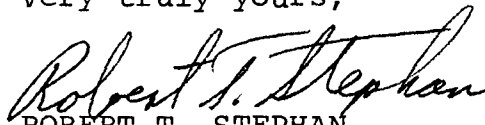
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organization, including the costs of merchandise. If it is proven that some of the costs deducted bore no relationship to the fund raising efforts or were fabricated or illegal expenses, then such charges may not be deducted when computing gross receipts. The Illinois court also recognized that there may be many factors to be considered in determining what constitutes legitimate and reasonable costs in a particular fund raising campaign.

From the facts made available to us we cannot state whether KETCH would be in violation of the Act. All the payments the telephone solicitation company receives pursuant to its contract with KETCH will be contributions within the meaning of the Kansas law. However, determination of the existence of a violation of the Act will depend upon a computation of the gross receipts. As long as the 10% of the contributions KETCH receives is not less than 75% of the gross receipts, as defined in the Act, the charitable organization could be found in compliance with the restriction on non-charitable use of gross receipts from contributions. K.S.A. 17-1747. The attorney general is authorized to proceed against the charitable organization as well as any other person soliciting, collecting or engaging in an act violating the Act. If a mathematical computation indicates KETCH will be unable to use at least 75% of the gross receipts for charitable purposes due to the fact that the telephone solicitation company will only deliver 10% of the contributions to KETCH, then the attorney general would have grounds for an injunctive action, among other things, against the charitable organization, the professional fund raiser, or both.

In conclusion, it is our opinion that KETCH is a charitable organization subject to the Charitable Solicitation Act. The activities of the telephone solicitation company and the contractual relationship between KETCH and the telephone solicitation company constitute solicitation of contributions by a professional fund raiser on behalf of a charitable organization. The attorney general may proceed against the charitable organization, the professional fund raiser, or both, if less than 75% of the gross receipts from the telephone solicitation are used for charitable purposes.

Very truly yours,


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